

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR BOARD  
WASHINGTON, D.C.**

M.D. MILLER TRUCKING & TOPSOIL, INC.

and

Case 13-CA-104166

GENERAL TEAMSTERS LOCAL UNION NO. 179,  
AFFILIATED WITH INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS

**RESPONDENT M.D. MILLER TRUCKING & TOPSOIL, INC.'S EXCEPTIONS TO  
ADMINISTRATIVE LAW JUDGE'S DECISION**

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Respondent M.D. Miller Trucking & Topsoil, Inc. (hereinafter "MD Miller" or the "Company") hereby files its Exceptions to the Decision and Order of Administrative Law Judge Ira Sandron ("ALJ") dated September April 9, 2014. MD Miller excepts to the Decision as follows:

1. MD Miller excepts to the ALJ's conclusion that he would "not consider as evidence what it asserts are Federal Motor Carrier Safety Administration regulations, inasmuch as they were not made part of the record." (ALJ Decision, p. 1, last sentence).
2. MD Miller excepts to the ALJ's factual finding that the testimony of Edward McCallum ("McCallum") and Gregory Elsbree should be credited "where it diverged from that of the Millers and Crownhart." (ALJ Decision, p. 2, line 29 to 31).
3. MD Miller excepts to the ALJ's factual finding that that McCallum's "testimony on direct and on cross-examination was quite consistent. In this regard, he did not appear to

attempt to minimize the effects of the multiple sclerosis with which he was diagnosed in May 2010. Moreover, Elsbree substantially corroborated him.." (ALJ Decision, p. 2, line 32 to 35).

4. MD Miller excepts to the ALJ's factual finding that "any such exaggeration" in the testimony of McCallum and Elsbree "paled in comparison to the unbelievable depiction of McCallum's conduct at the April 11 meeting as described by the Millers, particularly Ms. Miller." (ALJ decision, p. 2, lines 39-41).

5. MD Miller excepts to the ALJ's factual finding that portions of Chad Miller and Marlene Miller's testimony "rang false" and that he found their testimony with respect to McCallum's statements and behavior at the April 11 meeting "incredulous to the point of ludicrous." ALJ Decision, p. 2, lines 41-42, p. 3, lines 6-7.

6. MD Miller excepts to the ALJ's factual finding that he could not "believe that McCallum would have unleashed a tirade in response to her request that the drivers consider a cut in pay. If McCallum was concerned with his health insurance benefits, it makes no sense that he would have stated that he did not care what happened to the Company. The imputed statement, 'I don't give a fuck about anybody but myself' sounds quite farfetched, particularly when uttered at a group meeting attended by coworkers with whom McCallum had worked for years." ALJ Decision, p. 3, lines 7-12.

7. MD Miller excepts to the ALJ's factual finding that " Driver Crownhart was not a fully credible witness" and that his testimony "failed to corroborate the Millers.'" ALJ Decision, p. 3, lines 15-17.

8. MD Miller excepts to the ALJ's factual finding that "Ms. Miller's description of McCallum's conduct at the grievance hearing on April 22" was "incredible" and that her testimony regarding McCallum's conduct was an "undoubtedly overblown depiction" that

"further undermines [his] faith in the reliability of her testimony." ALJ Decision, p. 3, lines 19-23.

9. MD Miller excepts to the ALJ's factual finding that the Millers' testimony regarding McCallum's worsening physical condition and work abilities in 2012 "is wholly undermined by their allowing him to continue to work throughout 2012 and then calling him back to work in 2013" and that "there is no evidence that either of them ever expressed a concern, or even spoke to him, about his physical condition impacting his work performance." ALJ Decision, p. 3, lines 34-38.

10. MD Miller excepts to the ALJ's factual finding that Marlene Miller's testimony regarding the initial April 11, 2013 discharge of McCallum being justified, in part, by the negligent manner in which he left his truck that day was not credible and was unsupported by documentary evidence," especially insofar as the issue of the lawfulness of McCallum's April 11th discharge was not part of the General Counsel's Complaint and was not an issue before the ALJ. ALJ Decision, p. 4, lines 1-6.

11. MD Miller excepts to the ALJ's factual finding that the medical forms in McCallum's personnel file and produced at the hearing were inconsistent with, or rendered incredible, MD Miller's stated practice of requiring drivers to have medical cards and long forms on file with the Company even prior to 2013. ALJ Decision, p. 4, lines 8-16.

12. MD Miller excepts to the ALJ's factual finding that there was a "marked contrast in the degree of detail" Marlene "provided about what was said at the April 11 meeting also weighs against her believability." ALJ Decision, p. 4, lines 24-26.

13. MD Miller excepts to the ALJ's factual finding that it "is uncontroverted that after [McCallum spoke at the April 11 meeting], Miller interjected, and a heated exchange ensued between him and McCallum." ALJ Decision, p. 4, lines 26-27.

14. MD Miller excepts to the ALJ's conclusion that an adverse inference should be drawn against the Company because, he found, Marlene Miller could not "recall any specifics" of what was said at the April 11 meeting between Chad and McCallum. ALJ Decision p. 4, lines 28-31.

15. MD Miller excepts to the ALJ's factual finding that Crownhart was "not a fully credible witness" because he "tuned out" the heated conversation between Chad and McCallum at the April 11 meeting, when the "normal reaction would have been to listen more carefully to a heated exchange, not less so" convincing the ALJ that "Crownhart's professed complete lack of recall, as was the case with Ms. Miller, was not bona fide" and that Crownhart was reticent, reluctant and not fully forthcoming. ALJ Decision, p. 4, lines 33-39, 44-46.

16. MD Miller excepts to the ALJ's factual finding that "Ms. Miller was melodramatic during portions of her testimony, and her attempt to convince me that McCallum greatly upset her by his alleged profane outburst at the April 11 meeting was obvious--and unpersuasive" and that Chad Miller "seemed uncomfortable and somewhat impatient, leading me to suspect that he might be prone to losing his temper and that he might have over reacted to what McCallum said to Ms. Miller at the meeting." ALJ Decision, p. 4, lines 42 through p. 5, line 2.

17. MD Miller excepts to the ALJ's factual finding that MD Miller failed to satisfactorily explain why only 2013 documents were produced in response to Subpoena Paragraph 3 or that MD Miller's production of more than what was requested in the subpoena out

of "an abundance of caution" "flies in the face of real-world litigation and is totally unconvincing." ALJ Decision, p. 5, lines 16-24.

18. MD Miller excepts to the ALJ's factual finding that MD Miller's production of documents outside the scope of Subpoena Paragraph 10 was illogical in light of MD Miller's interpretation of the subpoena language, that MD Miller failed to explain why no list called for in subpoena Paragraph 10 was not produced despite Marlene Miller's affidavit statement saying that a list had been maintained, and that he found "Respondent's explanation unpersuasive." ALJ Decision, p. 5, lines 35-40.

19. MD Miller excepts to the ALJ conclusion that MD Miller failed to fully produce requested documents and that the sanction of barring MD Miller from "presenting evidence of a purported practice prior to 2013 of requiring employees to submit both cards and long forms" was warranted or appropriate. ALJ Decision, p. 6, lines 1-9.

20. MD Miller excepts to the ALJ's factual finding that MD Miller's claim that it had a "policy" prior to 2013 of requiring drivers to have on file current long forms and medical cards was refuted by the fact that McCallum's prior long form on file with Respondent expired on July 10, 2012, but he was allowed to work "through the remainder of 2012" and that he was called back to work in April 2013 without his submission of a long form. ALJ Decision, p. 6, lines 11-15.

21. MD Miller excepts to the ALJ's factual finding that McCallum returned to work in 2013 on about April 1. ALJ Decision p. 7, line 36.

22. MD Miller excepts to the ALJ's factual finding that Marlene Miller never said anything to McCallum about his ability to perform work. ALJ Decision, p. 7, line 44.

23. MD Miller excepts to the ALJ's factual finding that McCallum was more credible than the Millers with respect to their testimony that he showed marked deterioration in his ability to perform duties between 2010 and April. ALJ Decision, p. 8, lines 8-11.

24. MD Miller excepts to the ALJ's factual finding that "[t]hroughout his employment, McCallum submitted the medical cards, which were valid for 2 years until after he was diagnosed with MS; for 6 months thereafter" and that "[w]hen he first started in 2002, he asked Miller if he needed to submit the long form, and Miller replied no. He offered the long form again in 2004 and 2006, but they were not taken and placed in his file. In 2010, after his MS diagnosis, he voluntarily submitted his 2010 long form." ALJ Decision p. 8, lines 26-30.

25. MD Miller excepts to the ALJ's factual finding that McCallum offered the "most detailed" description of the April 11 meeting" and that, because of issues he had "with the credibility" of the Millers and Crownhart, he credited McCallum over their accounts." ALJ Decision p. 8, lines 40-42.

26. MD Miller excepts to the ALJ's factual finding that McCallum did not unleash "a stream of profanities or ma[ke] outrageous statements, as the Millers have averred." ALJ Decision, p. 9, lines 3-4.

27. MD Miller excepts to the ALJ's factual finding that Ms. Miller told employees at the April 11 meeting "they could either take a pay cut or come up with other alternatives that she could not discuss" or that she indicated a pay cut was going to be instituted. ALJ Decision, p. 9, lines 8-10.

28. MD Miller excepts to the ALJ's factual findings that McCallum waited until Ms. Miller stopped speaking before he stated he would not take a pay cut or opt out of his insurance" and that the chronology of statements at the April 11 meeting is as the ALJ found it, or that it is

"undisputed" that Ms. Miller fired McCallum for insubordination directly after or because McCallum told Chad "not to speak to him in such a manner." ALJ Decision, p. 9, lines 13-20.

29. MD Miller excepts to the ALJ's factual finding that in response to being told he was terminated, McCallum stated that all he had done was tell Chad "not to speak to him so." ALJ Decision, p. 9, lines 22-23.

30. MD Miller excepts to the ALJ's factual finding that Elsbree and McCallum were more credible than Ms. Miller with respect to the occurrences of the April 22 meeting and that Ms. Miller gave "unbelievable testimony" related thereto. and ALJ Decision, p. 10, line 21-22.

31. MD Miller excepts to the ALJ's factual finding that on the evening of April 22, Chad Miller called McCallum with a start time and repeated that he had to submit the long form before he could return to work. ALJ Decision, p. 11, lines 1-2.

32. MD Miller excepts to the ALJ's factual finding that it was "unclear from Ms. Miller's testimony whether she decided that McCallum needed to obtain a second opinion *sua sponte* or after that was recommended by a representative of the Federal Motor Carrier Safety Administration (FMCSA)" or that her testimony with respect thereto was in anyway self-contradictory. ALJ Decision, p. 11, lines 12-20.

33. MD Miller excepts to the ALJ's factual finding that Dr. Moiduddin's exam was "invasive." ALJ Decision p. 11, line 35-36.

34. MD Miller excepts to the ALJ's factual finding that "[w]ith respect to McCallum's objections to any cuts in benefits, Miller responded by swearing at him and threatening him with deprivation of overtime. When McCallum protested Miller's language, Ms. Miller stated that he was fired for insubordination. Thus, the Millers demonstrated express animus toward McCallum for his protected activity." ALJ Decision p. 14, lines 4-8.

35. MD Miller excepts to the ALJ's factual findings and conclusion that Ms. Miller's statement to McCallum that that if he filed a grievance over his discharge, it would go nowhere. This aside, her actions after the April 22 decisions in McCallum's favor, and other evidence of record, provide ample inferential evidence of animus." ALJ Decision, p. 14, lines 10-15.

36. MD Miller excepts to the ALJ's factual finding and conclusion that the "single most significant factor inferring animus" was Ms. Miller's testimony that she "immediately ran home" and reviewed McCallum's medical files, discovering he did not have a long form on file. ALJ Decision, p. 14, lines 17-21.

37. MD Miller excepts to the ALJ's factual findings and conclusion that animus could be inferred because the Millers had previously been very sympathetic to McCallum's MS and had accommodated his restrictions, but which underwent an abrupt and drastic change in attitude in April that "cannot be explained other than as reflection of animus against him for objecting at the April 11 meeting to cuts in contractual benefits and for successfully pursuing a grievance on his discharge." ALJ Decision, p. 14, lines 25-31.

38. MD Miller excepts to the ALJ's factual finding that "McCallum was never before directed to submit a long form, and Miller had in fact previously said that their submission was unnecessary." ALJ Decision, p. 14, lines 33-34.

39. MD Miller excepts to the ALJ's factual findings and conclusions that . ALJ Decision p. 18, lines 1-5, 8-9, 35-38.

40. MD Miller excepts to the ALJ's factual findings and conclusion that "Ms. Miller's three asserted reasons for why she directed him to get a second opinion [appearance, inability to do the job, and not being totally forthcoming on his long form], even though he submitted a current card and current long form from Dr. Syed, rang false and smacked of pretext" and that



the Millers never spoke with McCallum about his inabilities to perform functions of his job, or that Ms. Miller's contention that McCallum's lack of candor on his long form was "laughable" as a reason for requiring him to obtain a new one, and the "flimsiness of this purported reason has to be viewed as evidence of pretext." ALJ Decision p. 14, lines 36-47.

41. MD Miller excepts to the ALJ's conclusion that "Respondent treated McCallum arbitrarily and disparately [for sending him to an FMCSA-certified doctor for his second opinion], further reflections of inferred animus." ALJ Decision, p. 15, lines 7-8.

42. MD Miller excepts to the ALJ's finding and conclusion that "Respondent immediately focused on McCallum's MS as an ideal subterfuge to avoid its obligation to reinstate him as per the grievance panel's directive ." ALJ Decision, p. 15, lines 15-16.

43. MD Miller excepts to the ALJ's factual finding that McCallum engaged in "diligent efforts" to provide medical clearance. ALJ Decision, p. 15, lines 17.

44. MD Miller excepts to the ALJ's conclusion "that both direct and inferential evidence establish animus against McCallum for his protected activities." (ALJ Decision, p. 15, line 21-22).

45. MD Miller excepts to the ALJ's factual finding that " Respondent unquestionably discharged McCallum on April 11 because he objected to cuts in driver benefits. This, along with the circumstantial evidence of animus that I have described, lead to the conclusion that the Respondent effectively terminated him on and after April 22 because of his protected activities of objecting to cuts in contractual benefits and of filing grievances, including one pertaining to his April 11 discharge." (ALJ Decision, p. 15, line 24-29).

46. MD Miller excepts to the ALJ's conclusion that "the General Counsel has met his burden of establishing a *prima facie* case that the Respondent's effective termination of

McCallum on and after April 22 was because he engaged in protected activities." (ALJ Decision, p. 15, line 31-33).

47. MD Miller excepts to the ALJ's factual finding that "the Respondent's reasons for effectively terminating McCallum on and after April 22 were transparently pretextual" and that he "need not perform the second part of *Wright Line* analysis." (ALJ Decision, p. 15, line 33-35).

48. MD Miller excepts to the ALJ's conclusion that "the Respondent's effective termination of McCallum on and after April 22, for his conduct on April 11 and for filing grievances, violated Section 8(a)(3) and (1) of the Act." (ALJ Decision, p. 15, line 37-39).

49. MD Miller excepts to the ALJ's conclusion that Respondent violated Section 8(a)(1) of the Act by Ms. Miller, without notifying the Union or giving it an opportunity to attend, held a meeting with drivers in which she solicited them to agree to a cut in wages or other benefits provided in the collective-bargaining agreement, in order to keep the Company in business. She he thereby bypassed the Union and dealt directly with employees about a mandatory subject of bargaining." (ALJ Decision, p. 15, line 43-44; p. 16, line 1-7).

50. MD Miller excepts to the ALJ's conclusion that Respondent violated Section 8(a)(1) of the Act by: "After McCallum stated that he would be filing a grievance over his discharge, Ms. Miller stated that would be futile." (ALJ Decision, p. 16, line 9-11).

51. MD Miller excepts to the ALJ's conclusion that Respondent violated Section 8(a)(1) of the Act by "threaten[ing] McCallum with loss of overtime when he objected to any cuts in wages or other benefits mandated under the collective-bargaining agreement." (ALJ Decision, p. 16, line 13-14).

52. MD Miller excepts to the ALJ's conclusion that Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act by "Effectively terminat[ing] Edward McCallum on and after April 22, 2013." (ALJ Decision, p. 16, line 23-26).

53. MD Miller excepts to the ALJ's conclusion that Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act by the following conduct: "Bypassed the Union and dealt directly with unit employees concerning their wages or other benefits." (ALJ Decision, p. 16, line 32-33).

54. MD Miller excepts to the ALJ's conclusion that Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act by the following conduct: "Told employees that filing a grievance would be futile." (ALJ Decision, p. 16, line 35).


55. MD Miller excepts to the ALJ's conclusion that Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act by the following conduct: "Threatened employees with loss of overtime when they objected to any cuts in their wages or other benefits mandated by the collective-bargaining agreement." (ALJ Decision, p. 16, line 37-38).

56. MD Miller excepts to the ALJ's conclusion that any remedy is necessary. (ALJ Decision, p. 16, line 42-47; p. 17, line 1-12).

57. MD Miller excepts to the ALJ's conclusion that the recommended Order is necessary. (ALJ Decision, p. 17, line 15-44; p. 18, line 1-35).

Dated: May 21, 2014.

**M.D. MILLER TRUCKING & TOPSOIL, INC.**

By:   
One of its Attorneys

Jeffrey A. Risch  
Michael F. Hughes  
SMITHAMUNDSEN LLC  
3815 E. Main Street, Suite A-1  
St. Charles, IL 60174  
(630) 587-7910 - Telephone  
(630) 587-7960 - Facsimile  
**ATTORNEYS FOR RESPONDENT**


## **CERTIFICATE OF SERVICE**

Michael F. Hughes, an attorney for the Employer, hereby certifies that a true and correct copy of the foregoing Respondent M.D. Miller Trucking & Topsoil, Inc.'s Exceptions to the Administrative Law Judge's Decision was served electronically upon the following on this 21st day of May, 2014:

Office of the Executive Secretary  
Mr. Gary Shinnars, Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, D. C. 20005-3419

Counsel for General Counsel  
Mr. Kevin McCormick, Esq.  
National Labor Relations Board  
209 South LaSalle Street, Suite 900  
Chicago, IL 60604

Baum, Sigman, Auerbach & Neuman, Ltd.  
Mr. Brian C. Hlavin  
200 West Adams Street, Suite 2200  
Chicago, Illinois 60606  
bhlavin@baumsigman.com

By:   
Michael F. Hughes  
SMITHAMUNDSEN LLC  
3815 E. Main Street, Suite A-1  
St. Charles, IL 60174  
mfhughes@salawus.com